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No. 10-232

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

THE BANK OF NEW YORK MELLON AND
THE BANK OF NEW YORK MELLON CORPORATION,
Petitioners,

v.

FREDERICK J. GREDE, AS TRUSTEE OF THE
SENTINEL LIQUIDATION TRUST,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 128 S. Ct. 2531 (2008), the Supreme Court held that an assignee of a claim for collection purposes is the real party in interest and therefore has standing to pursue the assigned claim even if the assignee is obligated to pay all of the recoveries received on account of the assigned claim to the assignor. Applying *Sprint*, the Seventh Circuit concluded that the Sentinel Liquidation Trust (the "Trust"), an entity formed under Delaware law to implement a confirmed chapter 11 plan, had the authority to pursue claims creditors had assigned to the Trust against The Bank of New York Mellon and The Bank of New York Mellon Corporation (the "Bank" or "Petitioner"). In so holding, the Seventh Circuit rejected the Bank's argument that the Trust was improperly using general Trust assets for the benefit of only a select group of its beneficiaries. It concluded that the Bank had no basis to complain about a perceived injury to the Trust's beneficiaries. Furthermore, the Bank, which was a creditor of the chapter 11 debtor and an active participant in its chapter 11 case, did not object to the assignment of creditor claims against it to the Trust before the Bankruptcy Court confirmed the plan of reorganization that created the Trust. The Seventh Circuit held that by failing to object at that time, the Bank missed its opportunity to complain about the formation and powers of the Trust. The question presented is:

Whether a defendant in a lawsuit brought by a post-confirmation state law trust created to implement a plan of reorganization can collaterally attack the trust's authority post-bankruptcy to pursue claims against it on the basis of injuries it claims the trust's beneficiaries may suffer if the claims against it proceed.

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RESPONDENT'S BRIEF IN OPPOSITION

This Court should decline to review the Seventh Circuit's decision because it does not conflict with this Court's precedent or the Bankruptcy Code, involve a true Circuit split or threaten substantial harm to the bankruptcy process. The Seventh Circuit's decision merely rejects the Bank's overreaching efforts to avoid answering charges of its own misconduct by raising concerns that affect only third parties' interests (which concerns those third parties are not raising themselves). In so ruling the Seventh Circuit relies squarely and correctly on *Sprint Communications Co., L.P. v. APCC Services, Inc.*, 554 U.S. 269, 128 S. Ct. 2531 (2008), and reaches the same result this Court reached in *United Student Aid Funds, Inc. v. Espinosa*, -- U.S. --, 130 S. Ct. 1367 (2010).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Bank asserts that two statutory provisions are involved in this case: 11 U.S.C. §§ 323(a) and 704(a)(1). Neither of these provisions, however, in fact applies as both only govern the conduct of trustees operating during a bankruptcy case. The Trust in this case was formed post-confirmation and Frederick J. Grede, its trustee, is not now, and was not at the time the lawsuit in question was filed, a bankruptcy trustee. Further, section 704(a)(1) could not apply in any event because the underlying bankruptcy case was a case under chapter 11 of title 11, and not a chapter 7 case. 11 U.S.C. § 103(b)

states: "[s]ubchapters I and II of chapter 7 of this title apply only in a case under such chapter." Section 704(a)(1) is found in subchapter I of chapter 7. Further 11 U.S.C. § 1106(a) excludes section 704(a)(1) from the list of section 704 duties that apply to chapter 11 trustees.

STATEMENT OF THE CASE

a. Sentinel's Business, Its Misuse Of Customer Funds, And The Bank's Participation.

Sentinel Management Group, Inc. ("Sentinel"), the debtor in the underlying bankruptcy case, was registered as a futures commission merchant and investment advisor. (C.A. App. 10 at ¶ 17.) The Bank acted as Sentinel's clearing bank, its lender and its depository institution. (C.A. App. 13-15 at ¶¶ 35, 37-39.) Beginning in 2003, without informing its customers, Sentinel changed the nature of its investments and began using significant leverage, which put its customers' assets at risk if the market moved adversely. (C.A. App. 19 at ¶ 56.) Although the Bank had entered into agreements acknowledging that the assets in Sentinel's accounts were customer funds that would never be subject to the bank's lien or applied to offset any indebtedness of a third party (C.A. App. 13-14 at ¶¶ 32, 35, 37), it nonetheless established a securities clearing system that required Sentinel to funnel all its purchases and sales of securities through accounts against which the Bank held a security interest. The Bank put the securities into these liened accounts without regard to whether the securities were purchased for Sentinel (and thus fair game for the Bank's liens) or

for its customers (and not available to secure the Bank's debt). (C.A. App. 14-15 at ¶ 38.)

Senior officers of the Bank knew that Sentinel was using its loan to finance a leveraged investment strategy. (C.A. App. 23-26 at ¶¶ 70-72, 78.) The Bank also knew that Sentinel was representing in financial reports submitted to regulators that it had no bank loans whatsoever, and that all of its customer securities were properly held in segregated accounts. (C.A. App. 22, 29, 30 at ¶¶ 69, 97, 101.) In addition, senior officers of the Bank knew that Sentinel had minimal capital of its own (less than $2 million), and that the collateral supporting the loan to Sentinel consisted of assets Sentinel had no right to pledge. (C.A. App. 31-33, 39 at ¶¶ 102-104, 110, 130-131.) When Sentinel collapsed, the Bank asserted a lien over hundreds of millions of dollars in securities that it should have been holding in segregated customer accounts. (C.A. App. 7 at ¶¶ 3-4.)

b. Sentinel's Bankruptcy Filing.

On August 17, 2007, Sentinel filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. (C.A. App. 352.) On August 29, 2007, the Bankruptcy Court approved the United States Trustee's appointment of Mr. Grede to serve as Sentinel's chapter 11 trustee. (*Id.*)

c. The Plan, The Bank's Objections, And The Confirmation Process.

On May 12, 2008, the chapter 11 trustee and the statutory committee appointed to represent Sentinel's creditors jointly proposed a plan of

liquidation (the "Plan"). (C.A. App. 346.) To facilitate recoveries against the Bank and other third parties allegedly involved in the fraud that led to Sentinel's bankruptcy, the Plan provided for the creation of a Trust that would pursue litigation assets. (C.A. App. 86-95 at ¶¶ 6.1-6.21.) The Plan also provided that the Trust would receive, among other things, the estate's causes of action against third parties. (C.A. App. 91 at ¶ 6.12.)

In addition, the Plan gave Sentinel's unsecured customer creditors the option when voting on the Plan to elect to assign Sentinel-related causes of action against the Bank and others to the Trust, for prosecution by the Trust at the discretion of the Trust's trustee (the "Liquidation Trustee"). (*Id.*) In return, the assignors generally would be paid the money recovered from the assigned claims on a *pro rata* basis. (C.A. App. 85 at ¶ 4.5(a), 91 at ¶ 6.12.)

After the Plan was filed, the Bank objected to the Plan and participated extensively in the two-day confirmation hearing. (C.A. App. 190-227, 229-244, 256, 276-284, 286, 311-313, 321-327.) The Bank objected to the treatment of its disputed secured claim and alleged that the Plan was not proposed in good faith because it allegedly would be implemented outside of the control of the Bankruptcy Court. (C.A. App. 226-227.) The Bank did not object to the assignment of creditor claims against it to the Trust, or argue that post-confirmation the Liquidation Trustee would lack standing to prosecute the assigned claims. (C.A. App. 191-192, 229-244.)

Although the Bank ultimately withdrew its objections to the Plan before the Bankruptcy Court

ruled (C.A. App. 245-252, 253-254), the Bankruptcy Court was still obligated to determine independently that the Plan complied with 11 U.S.C. § 1129. (C.A. App. 355-56.) On December 15, 2008, the Bankruptcy Court issued a 67-page Memorandum Opinion setting forth its reasons for confirming the Plan and entered a Confirmation Order. (C.A. App. 346-412.) Neither the Bank nor any of the other objectors appealed the Confirmation Order. The Confirmation Order is now a final order.

d. Implementation Of The Plan.

On December 17, 2008, Sentinel's Plan became effective and the Trust was created. (C.A. App. 117.) On that date, Mr. Grede resigned as the chapter 11 trustee and accepted the appointment as Liquidation Trustee, the Sentinel bankruptcy estate transferred its assets to the Trust, and creditors that had agreed to assign their causes of action to the Trust did so. (C.A. App. 87 at ¶ 6.3, 88 at ¶ 6.4.) The Plan and Trust Agreement gave the Liquidation Trustee discretion to prosecute or settle all of the Trust's causes of action, including those assigned to the Trust by creditors as he deemed appropriate, in general subject only to the oversight of the Liquidation Trust Committee. (C.A. App. 87-89 at ¶¶ 6.3, 6.5, 120-123 at ¶¶ 2.2, 2.5.)

e. Actions Against the Bank.

While he was still serving as chapter 11 trustee, Mr. Grede filed a lawsuit against the Bank asserting claims that belonged to the bankruptcy estate. In that case, which is still pending in District Court, he sued the Bank in his capacity as the chapter 11 trustee, *inter alia*, to recover preferential and

fraudulent transfers, for equitable subordination of the Bank's secured claim, and for aiding and abetting the Sentinel insiders' breach of their fiduciary duties to Sentinel. The District Court dismissed the aiding and abetting claim, ruling that the *in pari delicto* doctrine barred the claim, but allowed the balance of the case to proceed. *See Grede v. Bank of New York*, No. 08-C-2852, 2009 WL 188460, at *9 (N.D. Ill. Jan. 27, 2009). The District Court recently tried that case and has it under advisement now.

After the Plan became effective and the Trust was created, the Liquidation Trustee brought a second case against the Bank asserting the claims that Sentinel's creditors had assigned to the Trust and to which the *in pari delicto* defense does not apply. (C.A. App. 6-53.) The Bank moved to dismiss this action under Rule 12(b)(1) and (6), arguing that the Liquidation Trustee lacked standing to bring the assigned claims and alternatively failed to state valid causes of action. (Pet. App. 9a.) This second lawsuit is the action at issue in this appeal.

f. The Decisions Below.

The District Court granted the Bank's motion to dismiss. The District Court allowed the Bank to raise what were new and collateral objections to the final Confirmation Order approving the Plan because the Bank had voluntarily withdrawn different objections to the Plan before the Confirmation Order was entered. The District Court concluded that this was acceptable because the Bank's original (and different) objections "were never ruled on." (Pet. App. 12a-13a.) The District Court also held that the

question of the Trust's authority to prosecute the claims assigned to it was jurisdictional so the Bank could raise the issue belatedly. (*Id.*) The District Court then reasoned that allowing the Liquidation Trustee to bring suit on the assigned claims would be outside the scope of his express authority found in 11 U.S.C. § 704(a)(1).[1] According to the District Court, Code Section 704 only specifically authorized the Liquidation Trustee to collect property of the estate. Because the District Court concluded the assigned creditor claims were not property of the estate within the meaning of 11 U.S.C. § 541(a), it held the Liquidation Trustee had no statutory authority to bring suit. Ignoring *Sprint*, the District Court then concluded, based upon *Williams v. California 1st Bank*, 859 F.2d 664 (9th Cir. 1988), that this lack of express authorization in the Code coupled with the fact that the Trust would pay the proceeds of the assigned claims to the assigning creditors meant the Liquidation Trustee had no standing to prosecute the claims. (Pet. App. 17a-20a.)

The Seventh Circuit reversed, holding that under *Sprint* the Trust was the real party in interest with jurisdictional standing to prosecute the assigned claims even though it would pay any recoveries to the assigning creditors. (Pet. App. 2a-3a.) Having concluded that there was jurisdiction to allow an assignee, like the Trust, to pursue claims assigned to it for collection purposes, the Seventh Circuit reasoned that the issue before the Court was not one

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[1] The District Court's Opinion cites to section 704(1). (Pet. App. 16a.) Presumably this is a typographical error for there is no section 704(1). The correct citation is 11 U.S.C. § 704(a)(1).

of jurisdictional "standing" but rather whether the Trust had authority to prosecute the assigned claims. (Pet. App. 3a.)

On this point, the Seventh Circuit concluded that post-bankruptcy, the Bankruptcy Code did not govern the Trust or the permissible duties of the Liquidation Trustee; instead, the terms of the confirmed Plan and the Trust "govern the permissible duties of a trustee *after* bankruptcy." (Pet. App. 6a (emphasis in original).)

The Seventh Circuit then examined the three reasons set forth in *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), for why a bankruptcy trustee should not be allowed to use section 70 of the former Bankruptcy Act (former 11 U.S.C. § 110; now 11 U.S.C. § 544) to prosecute claims belonging only to a subset of a debtor's creditors, and concluded that none of those reasons applied in this case to bar the post-confirmation Trust from prosecuting the claims assigned to it by its creditor-beneficiaries. (Pet. App. 6a-8a.) In reaching this conclusion, the Seventh Circuit noted that "the Bank's principal argument is that the Trust should not be allowed to deplete its assets by the expense of litigating the investor's claims." (Pet. App. 7a.) The Seventh Circuit rejected this argument both because this perceived harm does not injure the Bank and because no one, including the Bank, raised this objection before the Plan was confirmed, even though the alleged harm about which the Bank belatedly complained below "was apparent to any reader of the plan or the trust documents." (Pet. App. 7a.) Accordingly, the Seventh Circuit concluded that *Caplin* did not apply

and reversed the judgment of the District Court. (Pet. App. 8a.)

REASONS FOR DENYING THE PETITION

None of the three reasons the Bank offers in its Petition justify review of the Seventh Circuit's decision in this case. First, the Seventh Circuit's ruling does not conflict with this Court's decision in *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), or with the Bankruptcy Code. Neither *Caplin* nor the Code addresses, let alone forbids the trustee of a post-bankruptcy trust established under state law from prosecuting creditors' claims assigned to that trust as the real party in interest. In fact, this Court already has spoken on this issue and opined to the contrary in *Sprint Communications Co., L.P. v. APCC Services, Inc.*, 554 U.S. 269, 128 S. Ct. 2531, 2536, 2542-43 (2008). There this Court held that an assignment of a cause of action provides the assignee with standing as the real party in interest to assert the claim even if the assignee is contractually obligated to pay all of the recoveries to the assignor. For this reason, the District Court was incorrect when it held that the standing issue was jurisdictional and prevented the Trust from proceeding on the assigned claims.

Second, the Seventh Circuit's ruling does not further deepen a Circuit split. The fact that the Seventh Circuit agreed with the Second Circuit and not the Ninth Circuit does not deepen a Circuit split where the decision the Seventh Circuit rejected, *Williams v. California 1st Bank*, 859 F.2d 664 (9th Cir. 1988), precedes *Sprint* by twenty years, is

distinguishable from the Seventh and Second Circuit decisions and is no longer good law following *Sprint*.

Third, the Seventh Circuit's ruling does not raise an important federal question that requires this Court's resolution. The Bank argues that this Court should intervene to prevent one group of the Trust's beneficiaries from potentially foisting their legal costs onto the other beneficiaries of the Trust. According to the Bank, this Court should step in to stop similar instances of "free riding." (Pet. 7.) An adequate mechanism, however, already exists to police the fairness of post-bankruptcy trusts. Under the Bankruptcy Code, creditors must vote to approve the terms of any chapter 11 plan that does not pay creditors in full. 11 U.S.C. §§ 1126, 1129(a)(10). If creditors believe that the terms of a post-confirmation trust are unfair or improvident, they can vote a plan down. The Court need not legislate protections beyond those already provided by the Bankruptcy Code, nor should it. Further, as the Seventh Circuit correctly observed, the Bank "is trying to fend off the Trust's claims not by standing on its own rights, but by asserting that the litigation might injure strangers (the Trust's beneficiaries). It's a basic principle that litigants can't invoke the rights of third parties." (Pet. App. 7a.)

Finally, review is inappropriate here for an additional reason. The Seventh Circuit concluded that the Bank's complaints were a collateral attack on a confirmed plan and therefore impermissible. (Pet. App. 7a-8a.) This ruling is in accord with this Court's recent decision in *United Student Aid Funds, Inc. v. Espinosa*, -- U.S. --, 130 S. Ct. 1367 (2010),

decided five days after the Seventh Circuit ruled in this case. There is no reason to revisit *Espinosa* given that this precedent is less than a year old and the case at bar does not raise any new points that would justify revisiting an issue so recently decided.

I. The Ruling Below Does Not Conflict With This Court's Rulings Or The Plain Meaning Of The Bankruptcy Code.

The Seventh's Circuit ruling does not conflict with this Court's precedent or federal law and, thus, there is no reason for the Court to review the lower court's decision. The Bank contends that the Seventh Circuit's decision is in conflict with this Court's ruling in *Caplin*, 406 U.S. 416. (Pet. 7-14.) *Caplin* held that a bankruptcy trustee appointed under chapter X of the now-repealed Bankruptcy Act did not have authority based upon section 70 of that Act (former 11 U.S.C. § 110) to bring suit on claims that belonged to a subset of the debtor's creditors, in that case, the debtor's bondholders. *Id.* at 434. Unlike the circumstances presented here, the bondholders in *Caplin* had not assigned their claims to the chapter X trustee. Instead, the chapter X trustee sought, on his own initiative, to pursue claims that belonged to third parties and that had not been assigned to the bankruptcy estate. *Id.* at 420. The chapter X trustee argued that the powers he held under section 70 were broad enough to create standing. *Id.* at 424-25.

This Court rejected this argument, noting that the Bankruptcy Act in effect at the time did not give the trustee the authority to bring claims that belonged to others. *Id.* at 432-34. In reaching this

conclusion, the Court set forth three reasons why it was appropriate to limit the use of section 70 in this manner. *Id.* The Court did not address what would have happened had the bondholders in *Caplin* actually assigned their claims to the chapter X trustee, and also did not discuss whether a post-bankruptcy successor to the debtor could accept assignments of such claims. *Id.*

In the Petition, the Bank makes much of the fact that when Congress enacted the current Bankruptcy Code it proposed a statutory provision that would have overruled *Caplin*, but ultimately did not include this provision in the Bankruptcy Code. The Bank argues that bankruptcy trustees receive no greater rights under the current Bankruptcy Code (11 U.S.C. § 544) than under former section 70. (Pet. 8.) The Trust, however, does not base its authority to sue the Bank on Code section 544 or on any other provision of the Bankruptcy Code; rather its authority to sue is based upon the terms of the confirmed Plan, the Trust and the voluntary assignments of those claims to the Trust. For this reason, the issue this Court decided in *Caplin* is not the same issue that the Seventh Circuit confronted below.

Instead, the Seventh Circuit considered whether the trustee of a trust created under state law -- not a trustee under either chapters 7 or 11 of the Bankruptcy Code -- has authority to prosecute claims as the assignee holding complete legal title to the assigned claims. As the decision below correctly recognizes, the Liquidation Trustee is not bound by *Caplin* but is pursuing those claims as the real party in interest, as did the assignee in *Sprint*.

Sprint held that an assignment of a cause of action provides the assignee with standing to assert the assigned claim even if the assignee is contractually obligated to pay all of the recoveries to the assignor. 128 S. Ct. at 2536, 2542-43. In *Sprint*, thousands of payphone operators assigned claims against the defendant long-distance communications carriers. *Id.* at 2534. Under the terms of the assignments, the aggregators agreed to "remit all proceeds" of the suits to the customers. *Id.* The petitioners argued that the aggregators lacked standing because they claimed to have suffered no injury themselves and would not retain any of the recoveries from the lawsuits. *Id.* at 2542. This Court rejected the argument that the assignments failed to convey standing to the assignee, and held that the aggregators could prosecute the assigned claims:

> [W]e have discovered that history and precedent are clear on the question before us: Assignees of a claim, including assignees for collection, have long been permitted to bring suit. A clear historical answer at least demands reasons for change. We can find no such reasons here, and accordingly we conclude that the aggregators have standing.

Id. at 2536.

Nor does the Bankruptcy Code limit the Liquidation Trustee's authority to prosecute the claims at issue here. Because the instant case has never been a chapter 7 case, section 704(a)(1) has never applied in this case. *See* 11 U.S.C. §§ 103(b),

1106(a). Thus, the District Court erred when it concluded that section 704(a)(1) placed a limit on what the Trust could do.

Instead, as the Seventh Circuit correctly held, the Bankruptcy Code not only permits, but expressly contemplates, that as part of a plan, a debtor may transfer estate property to a new entity charged with the responsibility for liquidating and distributing these assets to creditors. 11 U.S.C. § 1123(a)(5); *Holywell Corp. v. Smith*, 503 U.S. 47, 55 (1992); *Torch Liquidating Trust v. Stockstill*, 561 F.3d 377, 387 (5th Cir. 2009). The Bankruptcy Code places no limitation on the ability of such an entity to prosecute assigned creditor claims, and, indeed, places virtually no restrictions on the operations of such a liquidating entity post-confirmation. For this reason, no court has ever extended any of the standing restrictions or limitations imposed upon bankruptcy estates or bankruptcy trustees to a post-confirmation liquidation entity. The only other Court of Appeals to reach the issue, the Second Circuit, reached the same result as the Seventh Circuit, concluding that there is no prohibition upon a post-confirmation trust taking an assignment of creditor claims. *Semi-Tech Litig., LLC v. Bankers Trust Co.*, 450 F.3d 121, 126-27 (2d Cir. 2006), *adopting* 272 F. Supp. 2d 319, 324 (S.D.N.Y. 2003).

Thus, as the Seventh Circuit correctly recognized, "the terms of the Bankruptcy Code govern the permissible duties of a trustee *in* bankruptcy [and] the terms of the plan of reorganization (and of the trust instrument) govern the permissible terms of a trustee *after* bankruptcy." (Pet. App. 6a (emphasis

in original).) For this reason, the Seventh Circuit's opinion is not in conflict with federal law.

II. The Ruling Below Does Not Deepen A Circuit Split Over Trustee Standing Because After *Sprint*, *Williams* Is No Longer Good Law.

There also is no Circuit split on the question raised by the Bank's Petition for two reasons. First, as the Bank acknowledges, the Ninth Circuit's decision, *Williams,* 859 F.2d at 667, involves the ability of a chapter 7 trustee to prosecute an assigned cause of action. (Pet. 14.) Unlike the instant case, the trustee in *Williams* was not the trustee of a post-confirmation Trust. This distinction is critical because, as the Seventh Circuit explained in its ruling, the Trust is not governed by the Bankruptcy Code, but rather by the terms of the confirmed plan and the trust agreement. (Pet. App. 6a.)

Second, after *Sprint*, the rationale underlying the *Williams* decision is no longer good law. In *Williams*, the Ninth Circuit concluded that because the assignees of the claims would receive "the bulk of any recovery" collected by the chapter 7 trustee, they remained the "real parties in interest" on the assigned claims, not the chapter 7 trustee. 859 F.2d at 666-67. For this reason, the Ninth Circuit concluded that the trustee was not bringing claims on behalf of the estate.

Sprint, however, explicitly rejects the premise of *Williams*, holding that an assignee with complete legal title to the assigned claims is the real party in interest no matter how it will distribute the proceeds

of any recoveries. 128 S. Ct. at 2542-43. It is now settled, under *Sprint*, that an assignee is the real party in interest, irrespective of whether the assignee will receive a benefit from the litigation. *Id.* at 2544. As this Court held, "an assignee for collection may properly bring suit to redress injury originally suffered by his assignor." *Id.* at 2543.

Moreover, there is no prohibition in the Bankruptcy Code against a bankruptcy estate acquiring property post-petition through an assignment. 11 U.S.C. § 541(a)(7) expressly provides that property of the estate includes "[a]ny interest in property that the estate acquires after the commencement of the case." Therefore, if the Ninth Circuit were to revisit the issue it decided 22 years ago in *Williams,* it likely would conclude that because a chapter 7 trustee may acquire property post-petition, including causes of action, and because, if a trustee does so, under *Sprint,* the estate would be the real party-in-interest, no matter to whom it paid the recoveries, the holding in *Williams* is no longer good law.

The two cases the Bank highlights in its Petition certainly do not warrant this Court's review. They are not federal Court of Appeals decisions and both are distinguishable. In *Mukamal v. Bakes*, 383 B.R. 798 (S.D. Fla. 2007), the terms of the assignments purported to allow both the trust and the creditors to bring exactly the same claims. In particular, the plan expressly allowed the assignors/creditors "to initiate and pursue their own identical actions independent of litigation initiated by the [liquidation trustee], so long as their independent actions do not

seek the proceeds of the directors and officers insurance policies that cover the defendants." *Id.* at 813 n.13. Consequently, the purported assignments failed to transfer the assigned creditor claims exclusively to the liquidation trust. In addition, on grounds of untimeliness, the court did not allow the liquidation trustee to argue that the liquidating trust was created under state law rather than under the Bankruptcy Code. *Id.* at 811 n.9. Finally, the court recognized that the liquidation trustee might have had standing if all creditor claims had been assigned to him. *Id.* at 814.

In *Trenwick America Litigation Trust v. Ernst & Young*, 906 A.2d 168 (Del. Ch. 2006), *aff'd sub nom. Trenwick America Litigation Trust v. Billett*, 931 A.2d 438 (Del. 2007), the court found that the creditors had not assigned their claims to the litigation trustee and therefore he could not bring the claims. 906 A.2d at 189-191. The court's alternative ground for decision -- that the litigation trust would not have had standing under federal bankruptcy law even if the creditor claims had been assigned -- was pure dictum. *Id.* at 191.

In its ruling the Seventh Circuit carefully analyzed why *Caplin* was inapplicable and why it disagreed with *Williams*. But that decision ultimately does not matter because *Sprint* has already resolved any Circuit split that existed by knocking out the rationale of the *Williams* decision. Since neither *Caplin* nor the Bankruptcy Code forbid a state-law created post-bankruptcy trust from pursuing creditor claims assigned to it, this Court should deny the Bank's Petition.

III. The Ruling Does Not Raise An Important Federal Question That Requires This Court's Consideration Because The Bankruptcy Process Does Not Stand To Suffer Substantial Harm.

The Seventh Circuit's ruling does not threaten severe adverse practical consequences to pending bankruptcy cases. The Bank claims that if the Seventh Circuit's ruling is not reversed, trustees will not be able to resist drawing freely on estate assets to pursue creditor claims. According to the Bank, this creates two problems. First, creditors that participate in such trusts may be harmed if the litigation recoveries on account of assigned claims are not paid to them. (Pet. 17-19.) The Bank speculates that some creditors will be forced to subsidize the litigation costs of others. (*Id.*) Second, the Bank contends that the Seventh Circuit's ruling may allow bankruptcy trustees to run amok without any exercise of prudent litigation judgment. (*Id.*)

Both arguments are specious. As to the first, the Bankruptcy Code already puts in place adequate mechanisms to protect creditors. Under the Bankruptcy Code, creditors must vote to accept a chapter 11 plan that does not repay their claims in full. 11 U.S.C. §§ 1126, 1129(a)(10). If a plan prejudices creditors, they can vote against the plan and it will not be confirmed. 11 U.S.C. § 1129(a)(10). Further the bankruptcy court must find that any plan that is confirmed "has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). These provisions of the Code already protect creditors adequately against unfair

plans. The Court should not impose a judicial solution for a problem that does not exist.

The underlying premise of the Bank's second argument is without merit. The Bank contends that trusts like the Trust are not constrained by litigation costs from bringing lawsuits based upon assigned claims. Thus, the Bank argues that without some form of constraint a trust will bring claims without regard to whether such claims have merit and entities like the Bank will be exposed needlessly to litigation risk. Existing procedures, however, protect the Bank against meritless litigation, including Fed. R. Civ. P. 11 and 28 U.S.C. § 1927.

Another important safeguard also exists to protect against improvident trustees. Presumably creditors (who want to receive payment on their claims) will not select a trustee who has failed to exercise prudent litigation judgment or who has run up expenses prosecuting meritless claims achieving limited or no results in his earlier cases. Thus, imprudent trustees will be weeded out of the process. Again, these protections sufficiently guard against the harms the Bank predicts from allowing creditors to assign their claims to a post-bankruptcy trust.

The Bank's proposed solution -- an outright ban forbidding post-bankruptcy trusts from pursuing assigned claims -- would deprive bankruptcy estates from the benefits that post-bankruptcy trusts create. As the Seventh Circuit recognized, such trusts serve the legitimate purpose of facilitating "efficient aggregation of claims." (Pet. App. 4a.) In this case, the assignment of creditor claims to the Trust has improved the Trust's ability to settle with third party

defendants other than the Bank. These settlements have achieved a greater recovery for the benefit of the creditor-beneficiaries of the Trust while providing the settling third-parties with broader releases. Trusts that provide for the assignment of creditor claims serve legitimate and important purposes.

IV. Further Review Is Not Warranted Because This Court Adequately Addressed The Question Presented Here In *Espinosa*.

One of the grounds for the Seventh Circuit's ruling below was that it was too late for the Bank to challenge the terms of the Trust. Relying upon decisions that hold that a plan of reorganization is not subject to collateral attack once it is confirmed, the Seventh Circuit held that even if the Bank had the right to complain about the terms of the Trust, it was too late for it to do so because the Plan had already been confirmed. (Pet. App. 7a-8a.)

This holding is in accord with this Court's decision in *Espinosa*, -- U.S. --, 130 S. Ct. 1367, decided five days after the Seventh Circuit ruled in this case. In *Espinosa*, a bankruptcy court confirmed a chapter 13 plan which provided that the debtor's student loans would be discharged even though such debts were not dischargeable under 11 U.S.C. § 1328. The creditor, however, did not object to the plan or appeal the confirmation order. Thereafter, the creditor challenged the order. The Court declined to void the confirmation order, concluding that even if the terms of the plan in that case were not consistent with the Bankruptcy Code, that did not make the

bankruptcy court's final judgment confirming the plan void. *Id.* at 1377.

Espinosa teaches that the time for the Bank to have raised its complaints about the Trust was during the confirmation hearing. Though it preceded *Espinosa*, the Seventh Circuit's decision also concluded that the Bank was too late to raise its "belated challenge to a confirmed plan of reorganization." (Pet. App. 8a.)

Espinosa has definitively answered, in the negative, whether a creditor can raise a challenge to the terms of a plan after the order confirming the plan has become a final order. Reviewing this case, which raises nearly the identical issue, will not further clarify or expand this rule of law. Therefore, there is no basis for this Court to review the Seventh Circuit's decision below.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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